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Oscar Canary Sdn Bhd v Tenaga Nasional Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)182–01 OF 2017
IDRUS HARUN, SURAYA OTHMAN AND STEPHEN CHUNG JJCA
14 JUNE 2019

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Public Utilities — Electricity — Meter-tampering — High Court judge found that meter had been tampered — Whether inspections carried out outside business hours — Whether respondent failed to comply with standard operating procedures — Whether findings of meter tampering unlawful — Whether meter tampered with — Whether decision of High Court judge correct — Electricity Supply Act 1990 — Licensee Supply Regulations 1990

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This was an appeal of the appellant against the decision of the High Court. The respondent had filed a suit in the High Court claimed that the appellant had tampered with the electricity meters installed in the appellant's premises and claimed a sum of RM4,037,491.80 for the electricity consumed. The appellant denied tapering and that it had paid the monthly bills issued. The High Court found that the meters had been tampered and awarded the said sum with interest at 5% from the date of judgment and costs of RM50,000. The respondent had conducted a routine inspection on the meter and found that they had been tampered and recorded the findings in the meter inspection forms and took photographs of the inspection and tampering. The source of the tampering was by way of a copper wire and a clamp to bypass the meter's circuitry. The respondent had lodged two police reports on the tampering. The appellant submitted that the inspections were carried outside of business hours and that the respondent failed to comply with the standard operating procedures and the findings were therefore unlawful.

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Held, dismissing the appeal with costs:

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(1) In this case, in carrying out routine inspections, the officers were accompanied by 'polis bantuan' and a representative of the appellant was informed and present during the inspections and there was no complaint or objection that the inspections were not during reasonable hours or that the entry was unlawful. Both the Electricity Supply Act 1990 and the Licensee Supply Regulations 1990 did not give any definition of what was 'at all reasonable times' nor that it be during working or office hours. Therefore what was reasonable time would depend on the facts and circumstances of each case (see para 21).

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(2) The respondent had provided ample evidence to show that the meters were tampered. The appellant on the other hand merely submitted that there were discrepancies and the appellant did not produce any evidence to the contrary. The appellant did not plead negligence and mala fide on the part of the respondent and there was no evidence that the calculations were unreasonable and unfair. The learned judge had accepted the evidence and explanations of the respondent's witnesses on the methodology in determining and calculating the loss of revenue and expenses. On the record of appeal, the court was of the view that the learned trial judge was not plainly wrong and there was no reason for the court to interfere with the decision made (see paras 24 & 30–31).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap keputusan Mahkamah Tinggi. Responden telah memfailkan guaman di Mahkamah Tinggi dan menuntut bahawa perayu telah mengubah dengan meter elektrik yang dipasang di premis perayu dan menuntut sejumlah RM4,037,491.80 untuk elektrik yang digunakan. Perayu menafikan penggubahan yang dikatakan dilakukan dan menyatakan bahawa ianya telah membayar bil bulanan yang dikeluarkan. Mahkamah Tinggi mendapati bahawa meter tersebut telah digubah dan mengawadkan jumlah tersebut dengan faedah 5% dari tarikh penghakiman dan kos RM50,000. Responden telah menjalankan pemeriksaan rutin di meter tersebut dan mendapati bahawa ianya telah digubah dan merekodkan dapatan dalam borang pemeriksaan meter dan mengambil gambar pemeriksaan dan pengubahan tersebut. Punca pengubahan tersebut adalah dengan cara wayar tembaga dan satu pengapit untuk memintas litar meter tersebut. Responden telah membuat dua laporan polis berkaitan dengan pengubahan tersebut. Perayu menghujahkan bahawa pemeriksaan dijalankan diluar waktu bekerja dan bahawa responden gagal untuk mematuhi dengan tatacara pengendalian piawaian dan oleh itu, dapatan mereka adalah tidak sah.

Diputuskan, mengetepikan rayuan dengan kos:

(1) Dalam kes ini, dalam menjalankan pemeriksaan rutin, pegawai diiringi oleh polis bantuan dan seorang wakil perayu telah dimaklumkan dan hadir sewaktu pemeriksaan tersebut dan tiada aduan atau bantahan bahawa pemeriksaan tersebut di luar waktu munasabah atau bahawa kemasukkan tersebut adalah tidak sah. Akta Bekalan Elektrik 1990 dan Licensee Supply Regulations 1990 tidak memberikan apa-apa takrifan kepada 'pada semua waktu yang munasabah' ataupun ianya adalah sewaktu waktu berkerja atau pejabat. Oleh itu, apa yang menjadi waktu munasabah akan bergantung kepada fakta dan keadaan setiap kes (lihat perenggan 21).

(2) Responden telah mengemukakan keterangan yang mencukupi untuk menunjukan bahawa meter telah digubah. Perayu sebaliknya hanya

menghujahkan bahawa terdapat percanggahan dan perayu tidak mengemukakan apa-apa keterangan untuk menyokong perkara yang sebaliknya. Perayu tidak memplid kecuaian atau niat burut responden dan tiada keterangan bahawa perangkaan adalah tidak munasabah dan tidak adil. Hakim terpelajar menerima keterangan dan penjelasan saksi responden berkenaan dengan cara menentukan dan mengira kerugian keuntungan dan perbelanjaan. Pada rekod rayuan, mahkamah berpandangan bahawa hakim bicara terpelajar tidak terkhilaf dan tiada alasan untuk mahkamah campur tangan dengan keputusan yang dibuat (lihat perenggan 24 & 30–31).]

Notes

For cases on meter-tampering, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2420–2422.

Cases referred to

Tenaga Nasional Bhd v Evergrowth Aquaculture Sdn Bhd [2017] 1 MLJ 380, CA (distd)
Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals [2018] 3 MLJ 141, FC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Electricity Supply Act 1990 ss 37(1), (3), (14), 38, 38(1), (3), (4)
Licensee Supply Regulations 1990 r 7

Appeal from: Suit No 22NCVC-607–12 of 2014 (High Court, Shah Alam)

Dinesh Praveen Nair (CM Lai and Loh Cien Zen with him) (CM Lai & Partners) for the appellant.
David Mathew (Hadi Mukhlis with him) (Steven Thiru & Sudhar Partnership) for the respondent.

Stephen Chung JCA (delivering judgment of the court):

THE APPEAL

[1] In this appeal, the appellant and respondent will be referred to as the defendant and plaintiff respectively as in the High Court suit. The plaintiff claimed that the defendant had tampered with the electricity meters installed at the defendant's premises and claimed a sum of RM4,037,491.80, as amended, for the electricity consumed. The plaintiff filed the suit to claim this sum plus interest and cost.

[2] The defendant did not deny that the meters were installed by the plaintiff

A to record the usage of electricity but denied tampering the meters and that it had paid the monthly bills issued. The defendant contended that the amount claimed was not correct.

B **[3]** After a trial, the learned judge found that the meters had been tampered and awarded the said sum with interest at 5% from the date of judgment, namely from 23 December 2016 and costs of RM50,000. Hence this appeal.

BRIEF FACTS

C **[4]** Two meters were installed at the two premises of the defendant, in Lot 5765, Kilang Metal Can, Jalan Kuala Selangor, Batu 22, Mukim Ijok, 45620 Bestari Jaya (Meter 5765) (Account 0150 00601801 09) and in Lot 252, Jalan Kuala Selangor, Batu 22, Mukim Ijok, 45620 Bestari Jaya (Meter D 252) (Account 0150 00587549 10).

[5] On 27 January 2011 the plaintiff conducted a routine inspection on the meter at each premises and found they had been tampered and recorded the findings in the meter inspection forms and took photographs of the inspections E and tampering. The source of the tampering in Lot 5765 was by way of a copper wire and in Lot 252 by using a clamp to bypass the plaintiff's meter circuitry. The plaintiff lodged two police reports on the tampering.

F **[6]** The plaintiff contended that due to the tampering, the first meter failed to properly record the usage by as much as -51.84% which was calculated at RM1,853,196.55 and the second meter by -86.21% at RM2,184,295.25.

THE DEFENDANT'S CASE

G **[7]** The defendant submitted that the inspections carried out at 8.35pm, outside of business hours, failed to comply with the standard operating procedures ('SOP') under r 7 of the Licensee Supply Regulations 1990 ('the Regulations') and that the inspections and findings of tampering were H unlawful.

[8] The defendant submitted that the plaintiff's calculation period for Meter 5675 started from 15 August 2007–27 January 2011. The plaintiff had conducted an inspection on the meter on 24 June 2010, which was only seven I months before the inspection on 27 January 2011 when the alleged tampering was allegedly found but there was no allegation of tampering or claim of unlawful usage during the inspection in 2010. The defendant submitted that in the absence of such claim or allegation of tampering, it was an unrebutted fact that Meter 5675 was not tampered and in good condition as at 24 June 2010.

[9] The defendant submitted that the plaintiff's case that Meter 5675 was tampered starting from 15 August 2007–27 January 2011 had been contradicted when the plaintiff's inspection on 24 June 2010 confirmed that Meter 5675 was not tampered with and operating perfectly. There was no allegation of undercharged electricity due to tampering during that period.

[10] It was submitted that even if tampering of Meter 5675 was indeed found during the inspection on 27 January 2011, the plaintiff's claim should only be for the period from 26 April 2010–27 January 2011 and had wrongly claimed for the whole period from 15 August 2007 for RM1,853,196.55.

[11] The defendant submitted that calculation of undercharged electricity by the plaintiff vide approximation must be reasonable, fair and depended on the quality of the evidence but the plaintiff's calculation period had included almost an additional three years during which Meter 5765 was not tampered and which should not have been claimed.

[12] The defendant submitted that the plaintiff had failed to prove its quantum and the appeal should be allowed. Alternatively, the defendant submitted that this court allowed the plaintiff's claim for Meter 5765 for the sum of RM334,353.14 only which was a more accurate and precise calculation.

[13] In respect of Meter 252, the defendant submitted that the Busbar and CT Terminal supplying current to the premises recorded by the meter were not tampered and in good condition. It was submitted that the tests ought to show that the primary and secondary current should correspond by applying the fixed ration of 1000/5A but the results recorded for the secondary current were one-third lower. The tests for Meter 252 showed huge discrepancies that differed from the ratio. It was submitted that this could be due to the transformer in the meter which reduced the incoming primary current but the plaintiff failed to explain the discrepancy which suggested that the meter was malfunctioning as opposed to being tampered and which affected the calculations.

THE CASE FOR THE PLAINTIFF

[14] The plaintiff submitted that the learned judge found that there was overwhelming evidence of tampering which the defendant failed to challenge or rebut. It submitted that the inspection in 2010 did not discover any tampering because the clamp and control switch used were non-permanent and could be removed or switched off and not evident during the inspection. It submitted that after the tampering was removed, the meters functioned

normally which showed that the tampering caused the meters to fail to record the usage properly.

[15] In reply to the defendant's allegation that the reading of the main meter and check meter did not tally, it submitted that a difference between the readings occurred because its inspection team had to shut the main meter and check meters in order to carry out the meter check and for tests to be carried out using clips. It submitted that its witnesses had explained the tests and checks carried out and their evidence had been accepted.

[16] It was submitted that the tampering had caused the plaintiff to suffer loss of revenue and incurred expenses as claimed. In respect of the calculations, the defendant failed to challenge the methodology used but only disputed the total figure arrived at from a mathematical perspective. The plaintiff admitted that there was a mathematical error in calculation of its loss of revenue and expenses but had applied to amend its claim to reduce the total sum claimed and recalled PW4 to explain the error and the correct figure which the learned judge had allowed. The plaintiff submitted that the learned judge did not err as such.

[17] It submitted that reasonable approximation or estimation is acceptable to prove its loss of revenue claimed under s 38 of the Electricity Supply Act 1990 ('the Act').

THE COURT'S DECISION

[18] Based on the record of appeal, the plaintiff was an electricity supply provider under the Act to consumers including the defendant. The plaintiff had installed a meter at each premises of the defendant. During a routine inspection on 21 January 2011, the plaintiff found that the two meters had been tampered which caused the meters to incorrectly record the usage of electricity resulting in loss of revenue. The plaintiff claimed against the defendant was for the loss of revenue.

[19] On the first issue, the defendant submitted that the inspection carried out at 8.45pm did not comply with r 7 of the Regulations and unlawful. Rule 7 provides that any officer authorised by a licensee may at all reasonable times on production of his authority enter any premises to which a supply of electricity is being given by the licensee for any of the following purpose, namely: (a) inspecting any supply line or electrical equipment; (b) ascertaining the register of any electricity meter; or (c) removing, inspecting or re-installing any electric meter or installing any substitute meter.

[20] It was not in dispute that officers from the plaintiff entered and carried

out routine inspections at the two premises, the first at 8.35pm and the second at 8.40pm. It was submitted that these were outside office hours and did not come within the requirement of 'at all reasonable times' provided in r 7, referring to the case of *Tenaga Nasional Bhd v Evergrowth Aquaculture Sdn Bhd* [2017] 1 MLJ 380 in support. In that case, employees of Tenaga Nasional carried an ambush as 'enforcers' in the wee hours of the dawn of the morning when no operational activity was going on which was clearly not an entry at a reasonable time. That case can be distinguished on the facts of this case.

[21] In this case, in carrying the routine inspections, the officers were accompanied by 'polis bantuan' and a representative of the defendant was informed and present during the inspections and there was no complaint or objection that the inspections were not during reasonable hours or that the entry was unlawful. Both the Act and the Regulations do not give any definition of what is 'at all reasonable times' nor that it be during working or office hours. Therefore what is a reasonable time will depend on the facts and circumstances of each case. We find that there was no merit on this issue.

[22] On the factual matrix and authorities cited, the relationship between the plaintiff and defendant was contractual in nature. On top of that, the plaintiff's entitlement to claim for loss of revenue is a statutory right conferred on the plaintiff under sub-s 38(3) of the Act. It has been held that there is no legal requirement to prosecute and convict the defendant before the plaintiff can make a claim for loss of revenue against the defendant. It is also not necessary for the plaintiff to prove that it was the defendant who had tampered the meter or that the defendant had no access to the meter installation. It is sufficient for the plaintiff to show that the meter has been tampered. It has been held that only a subjective finding of the plaintiff's employee is required to prove the tampering: *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141.

[23] In respect of the tampering, it was submitted that there could not be any tampering because during an inspection on 24 June 2010, the plaintiff did not discover any tampering and there was no complaint. It was submitted that therefore there could not be any tampering seven months later during the inspection on 27 January 2011. We have read the record of appeal and the submissions.

[24] Based on the evidence of the plaintiff's employees who testified that they found the meters tampered, the meter inspection forms filled in during the inspections, the photographs taken of the tampering, 'surat pemberitahuan pengambilan bahan-bahan bukti' and the police reports lodged, there was ample evidence that the meters had been tampered. As stated in the *Ichi-Ban*

A case, the finding whether an offence had been committed or not is based purely on the subjective finding of the employee of the licensee which is the plaintiff in this case. If the person employed by the licensee decides that an offence under s 37(1), (3) or (14), in his opinion has been committed, he may then require the consumer to pay for the loss of revenue. Therefore the learned judge B was correct in finding that there was overwhelming evidence that the meters were tampered and that the plaintiff had suffered loss of revenue as a result. These are findings of facts amply supported by the evidence adduced at the trial. We find no appealable error and no reason for us to interfere with the decision as such.

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[25] On evidence, the plaintiff did not disconnect the supply of electricity to the two premises. The plaintiff's claim for loss of revenue was made pursuant to s 38(3) of the Act. This right is separate and independent of its right to D disconnect the supply of electricity under s 38(1). After the plaintiff discovered that the meters had been tampered, by two letters, the plaintiff demanded payment of loss of revenue for RM1,931,519.46 and RM2,520,381.05 respectively, based on its calculations as set out in two written statements, which the defendant contended to be incorrect.

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[26] Looking at the two statements made under s 38(4) of the Act, which the parties had referred to, it was not in dispute that the plaintiff had set out the particulars and calculated the loss of revenue from 18 May 2007–27 January 2011 for Meter 5675 and from 12 February 2007–27 January 2011 for Meter F 252. The two written statements were prepared, checked and certified by the employees or duly authorised persons of the plaintiff with their names (Moliza bt Mohd Yusof, Amar Mohd Sharif and Ramli bin Baba) stated therein which were served on the defendant. There was no complaint that these two written statements did not comply with the requirements of s 38(4) of the Act. They G became prima facie evidence of the amount that the defendant had to pay for the loss of revenue. The burden shifted to the defendant to present rebuttal evidence.

H **[27]** The defendant had earlier filed two written submissions dated 6 December 2017 and 6 July 2018 respectively. On the date of hearing the appeal, counsel tendered 'the appellant's additional submissions'. In respect of Meter 5675, the defendant submitted that even if the tampering of Meter 5675 was found during the inspection on 27 January 2011, the calculation period I should be from 26 August 2010–27 January 2011 for RM423,579.55 only and not for RM1,853,196.55 from 15 August 2007–27 January 2011. In para 2.10 of its submissions, it amended the date from 26 April 2010–24 June 2010 because of a typing error but failed to amend the date in para 2.11 until it was pointed out to counsel.

[28] The written statement for Meter 5675 for the month of July from 1 July 2010 was for 30 days for amount of undercharged electricity at RM39,230.95. The defendant's amendment however for the same month of July was for seven days only for RM9,153.89. Based on the amended date of 24 June 2010, the defendant should have amended the number of days for the month of June instead of July. There was no explanation for this error. Based on the amendment it made to the month of July for the number of days, the defendant amended its calculation from RM423,579.55 to RM334,353.14. We took note that these two figures were not pleaded.

[29] In respect of Meter 252, it was submitted that as the Busbar and CT Terminal were not tampered and in good condition, the *borang pemeriksaan* showed clear discrepancies which PW1 failed to explain. It was submitted the *borang pemeriksaan* was tainted with significant errors and mathematical inaccuracies, which led to the entirety of the inspection carried out by the respondent to be doubtful and the results of the inspection should not be accepted. It was submitted that the discrepancies suggested the meter was malfunctioning as opposed to being tampered. We took note that where a meter had been tampered, it might be difficult to accurately assess the electricity consumed. In lieu of precise evidence, as for an example if there is a special device to measure the loss of revenue due to the tampering, approximation or estimation may be used provided it is reasonable and fair: *Ichi-Ban* case. Based on the tests carried out, in the column with the heading 'Jumlah Perbezaan' in the written statement, the plaintiff had set out the monthly amount of undercharged electricity from 12 February 2007–27 January 2011, namely since the meter was installed. These dates were unchallenged.

[30] PW4 gave evidence on the calculations for the loss of revenue and expenses claimed by using the ralat method and that the back-billing period for the loss of revenue was calculated based on the dates the meters at the premises were last changed until the date of the inspections when the meters were discovered tampered. PW4 had given evidence on the amount of undercharged electricity and had referred to the graphs of the defendant's monthly usage of electricity and reading history among other documents. Apart from its submission that there were discrepancies, the defendant did not produce any evidence to the contrary. For the reasons we have given above that the plaintiff had established that the meters had been tampered, there were no merits in the defendant's submission that the meter was malfunctioning as opposed to being tampered. These contradicted the submission that there were discrepancies. The defendant did not plead negligence and mala fide on the part of the plaintiff. There was no evidence that the calculations were unreasonable or unfair.

[31] The learned judge had accepted the evidence and explanations of the plaintiff's witnesses on the methodology in determining and calculating the loss of revenue and expenses. On the record of appeal, we were of the view that the learned judge was not plainly wrong and there was no reason for us to interfere with the decision made. At the end of the appeal, we did not find any merits in the appeal. Therefore we affirmed the decision of the High Court and dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Izzat Fauzan